PD-0617-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

THE STATE OF TEXAS, Appellant
v.
EDMUND KOKO KAHOOKELE, Appellee

03-18-00399-CR
In the Third Court of Appeals at Austin, Texas

On Appeal From the 207th Judicial District Court
Cause No. CR2017-356
Honorable Gary L. Steel, Judge Presiding
Comal County, Texas

BRIEF FOR THE STATE ON DISCRETIONARY REVIEW

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Submission on Briefs, Without Oral Argument

Identity of Judge, Parties and Counsel

Judge

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Table of Contents

Table of Authorities

Statutes, Rules, and Other Sources

Cases

Statement of Facts

Appellee was charged with two counts of the state-jail felony offense of Possession of a Controlled Substance in Penalty Group 1 Less Than One Gram, committed on or about December 28, 2016 (I C.R. at 15-16). *See* Tex. Health & Safety Code §481.115(b); Texas Penal Code §12.35. As alleged in the indictment, prior to the occurrence of these state-jail felony offenses, on or about March 12, 1990, Appellee pled guilty and was sentenced to ten years in the Texas Department of Corrections for Murder by Intending to Cause Serious Bodily Injury (I C.R. at 89-91). Additionally, on or about July 9, 1987, Appellee was convicted of third-degree felony Forgery by Possession and sentenced to five years in the Texas Department of Corrections (*id*. at 98-102). Further, on or about July 14, 2004, Appellee was convicted of second-degree felony Engaging in Organized Criminal Activity and sentenced to twenty years in the Institutional Division of the Texas Department of Criminal Justice (*id*. at 83-88).

The punishment range for the instant state-jail felony offenses was increased to that of a third-degree felony pursuant to §12.35(c) of the Texas Penal Code by Appellee's prior conviction for Murder (*id*. at 16). The punishment range for the instant offenses was further increased to 25 to 99 years or life pursuant to §12.42(d) of the Texas Penal Code (*id*.).

Summary of the Argument

Applying the plain language rule of statutory interpretation to the Texas Penal Code provisions regarding state-jail felonies and sentencing, it is clear that §12.35(a) and §12.35(c) state-jail felonies are treated differently. The statutory provisions provide that a §12.35(c) state-jail felony is subject to sentencing under the habitual-offender provision of §12.42(d) if the defendant has multiple prior, final, sequential, non-state-jail felony convictions.

Moreover, in any event, even if the statutes regarding punishment for state-jail felonies were considered 'ambiguous,' extratextual factors likewise demonstrate the Legislature's intent to continue to punish §12.35(c) state-jail felony offenders more harshly—including under §12.42(d).

I. The Plain Language of Sections 12.35, 12.42, and 12.425 of the Texas Penal Code Reflect That a §12.35(c) State-Jail Felony Offender May Be Sentenced Pursuant to the Habitual-Offender Provision in §12.42(d).

The Texas Constitution delegates to the Legislature the responsibility of making laws, while the Judiciary is entrusted with interpreting those laws. *See* Tex. Const. art. II, § 1; *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). In interpreting those laws, courts seek to effectuate the "'collective' intent or purpose of the legislators who enacted the legislation." *Boykin*, 818 S.W.2d at 785. This requires a focus on the text of the statute and interpreting the text in a literal manner, attempting to discern the fair, objective meaning of the text. *Id*. It is a court's duty to give the ordinary and plain meaning to the language of the Legislature. *Id*.

The "text of the statute *is the law* in the sense that it is the only thing actually adopted by the legislators…[w]e focus on the literal text…because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law." *Id*. at 783 (emphasis in original). "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991).

"Thus, if the meaning of the statutory text, when read using the established canons of construction relating to such text,[1] should have been plain to the legislators

[1]*See* Tex. Gov't Code §§ 311.001-.031.

who voted on it, we ordinarily give effect to that plain meaning." *Boykin*, 818 S.W.2d at 783. Indeed, judicial interpretation of statutory language should focus on the literal text of the statute because "the Legislature is *constitutionally entitled* to expect that the Judiciary will faithfully follow the specific text that was adopted." *Boykin*, 818 S.W.2d at 783 (emphasis in original).

Appellee asserts that a state-jail felony may only be enhanced to the punishment range associated with a second-degree felony based on the enactment of Section 12.425 of the Texas Penal Code in 2011. Appellee begins his analysis with the conclusory assumption that the "punishment enhancement statutes applying to state jail felonies punished under TEX. PENAL CODE§12.35(c) are ambiguous…" Brief for Appellee at 5. Additionally, Appellee cites various inapposite cases—dealing primarily with §12.35(a) state-jail felonies, not §12.35(c) state-jail felonies—for the proposition that the Legislature did not intend for state-jail felonies to be subject to the habitual offender provisions of §12.42(d). *See* Brief for Appellee at 26.[2]

[2] Appellee cites *State v. Warner*, 915 S.W.2d 873, 876 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd.), in his analysis of the Legislative History of state-jail felonies for the proposition that the Legislature "did not intend for state jail felonies, even aggravated ones, to be enhanced to habitual offender status pursuant to section 12.42(d)." Brief for Appellee at 26, *Warner*, 915 S.W.2d at 879. Notably, in *Warner*, the defendant was charged with possession of a controlled substance less than one gram, a §12.35(a) state-jail felony, and *Warner* was expressly overruled by *Smith v. State*, 960 S.W.2d 372 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) ("Because an aggravated state jail felony by definition involves a prior conviction for a felony of violence or particular aggravation, *allowing enhancement to habitual offender status is consistent with the purpose of the new state jail felony scheme…we hold that our statement in* Warner *was incorr*ect…") (emphasis added).

But this case deals with a different class of felony: the §12.35(c) state-jail felony. A review of the plain language of sections 12.35, 12.42, and 12.425 of the Texas Penal Code reveals the statutes are unambiguous, and application of the guiding principles of statutory construction demonstrates a §12.35(c) state-jail felony may be enhanced to habitual-offender status.[3]

A. A plain-language reading of the statutory provisions at issue reveals a §12.35(c) state-jail felony offender may be sentenced pursuant to §12.42(d) of the Texas Penal Code.

The version of §12.35 of the Texas Penal Code applicable to this case states:

> (a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
>
> […]
>
> (c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:
> ….
> (2) the individual has previously been convicted of any felony:
> (A) Under Section 20A.03 or 21.02 ***or listed in Section 3g(a)(1)***, Article 42.12, Code of Criminal Procedure; or

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Appellee cites several other cases that purportedly support his hypothesis, but they are factually distinguishable from the instant case. *See* Brief for Appellee at 19; *State v. Mancuso*, 919 S.W.2d 86 (appellees were charged with two separate state-jail felonies and "*the provisions of [§] 12.35(c) were not applicable*…") (emphasis added); *Gonzalez v. State*, 915 S.W.2d 170, 175 (Tex. App.—Amarillo 1996, no pet.) (defendant was charged with the delivery of cocaine, a §12.35(a) state-jail felony offense); *Wilkerson v. State*, 927 S.W.2d 112,115 (Tex. App.—Houston [1st Dist.] 1996, no pet.)(defendant was charged with burglary of a building, a §12.35(a) state-jail felony); *Ex parte Beck*, 922 S.W.2d 181 (Tex. Crim. App. 1996) (defendant was charged with burglary of a building, a §12.35(a) state-jail felony).

[3] For the sake of argument, an analysis of extratextual factors is also included in Section II, which results in the same conclusion: §12.35(c) state-jail felonies may be sentenced pursuant to the habitual offender provision in §12.42(d).

(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

Tex. Penal Code §12.35 (2015-2017) (emphasis added).[4]

While a §12.35(a)—or non-aggravated[5]—state-jail felony has a maximum punishment range of 2 years in state jail, a §12.35(c)—or aggravated—state-jail felony "*shall* be punished" with the punishment range applicable to a third-degree felony. *Id*. (emphasis added).

Section 12.425 of the Texas Penal Code provides:

(a) If it is shown on the trial of a state jail felony *punishable under Section 12.35(a)* that the defendant has previously been finally convicted of two state jail felonies punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the third degree.

(b) If it is shown on the trial of a state jail felony *punishable under Section 12.35(a)* that the defendant has previously been finally

[4] Am. Acts 2011, 82nd Leg., ch. 122 (H.B. 3000), § 13, effective Sept. 1, 2011, *amended by* Acts 2015, 84th Leg., ch. 770 (H.B. 2299), § 2.81, effective January 1, 2017 (hereinafter H.B. 2299). The current version of §12.35 of the Texas Penal Code which became effective on January 1, 2017 is virtually identical to the version in effect at the time Appellee was indicted. In 2015, the legislature amended the Code of Criminal Procedure by enacting a "*nonsubstantive* revision of certain laws concerning community supervision granted in criminal cases, including conforming amendments." *See* H.B. 2299, Sec. 1.01 (emphasis added). H.B. 2299 renumbered Art. 42.12 to 42A. Prior to the amendment, Sec. 3g was contained in Art. 42.12 of the Texas Code of Criminal Procedure; 3g offenses are now contained in Section 42A.054(a). That same legislative session, the language of § 12.35 of the Texas Penal Code that references Sec. 3g, Art. 42.12 was amended to reflect the aforementioned renumbering. *See* H.B. 2299, Sec. 2.81. For clarity and consistency, this brief will maintain references to art. 42.12 as that is the statutory provision that was in effect and used in the indictment in the instant case (*see* I C.R. at 16).

[5] Traditionally, courts have characterized the §12.35(a) state-jail felony as a "non-aggravated" state-jail felony and the §12.35(c) state-jail felony as an "aggravated" state-jail felony. *See, e.g., State v. Webb*, 12 S.W.3d 808, 811-12 (Tex. Crim. App. 2000); *Samaripas v. State*, 454 S.W.3d 1, 2 (Tex. Crim. App. 2014).

convicted of two felonies other than a state jail felony punishable under Section 12.35(a), and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a felony of the second degree.

(c) If it is shown on the trial of a state jail felony for which punishment may be enhanced under Section 12.35(c) that the defendant has previously been finally convicted of ***a*** felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.

Tex. Penal Code §12.425 (emphasis added).

The relevant provision of section 12.42 of the Texas Penal Code provides:

(d) … if it is shown on the trial of a felony offense *other than a state jail felony punishable under Section 12.35(a)* that the defendant has previously been *finally convicted* ***of two felony offenses***, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.

Tex. Penal Code § 12.42 (emphasis added).

Reviewing the plain language of the relevant statutes, the following punishments are applicable to an offender charged with a state-jail felony depending on the nature of the charged offense and the offender's prior criminal record:

'Non-aggravated' or §12.35(a) state-jail felony	
§12.35(a) state-jail felony	180 days – 2 years in a state-jail facility[6]
§12.35(a) state-jail felony with 2 prior 12.35(a) convictions[7]	2-10 years in prison[8]
§12.35(a) state-jail felony with 2 prior, non-state-jail felony convictions, in sequence	2-20 years in prison[9]

'Aggravated' or §12.35(c) state-jail felony	
§12.35(c) state-jail felony	2-10 years in prison[10]
§12.35(c) state-jail felony with 1 prior, non-state-jail felony conviction	2-20 years in prison[11]
§12.35(c) state-jail felony with 2 prior, non-state-jail felony convictions, in sequence	25-99 years or life in prison[12]

Accordingly, it is clear from the plain language of the statutes that Appellee's §12.35(c) felony, with *two* prior, sequential, non-state-jail felony convictions falls squarely within the ambit of §12.42(d) of the Texas Penal Code's sentencing

[6] Tex. Penal Code § 12.35(a).
[7] To avoid unnecessary repetition, all references to "prior convictions" encompasses an understanding that the convictions must be "final" convictions. *See* Tex. Penal Code §§12.42-12.425 ("…the defendant has previously been finally convicted…").
[8] Tex. Penal Code §12.425(a)
[9] Tex. Penal Code §12.425(b)
[10] Tex. Penal Code §12.35(c); §12.34.
[11] Tex. Penal Code §12.425 (c)
[12] Tex. Penal Code §12.42(d)

provisions. The statutory language of these provisions is unambiguous and should have been plain to the legislators reading it in context at the time of its enactment. *Boykin*, 818 S.W.2d at 786.

B. Applying longstanding principles of statutory construction to the plain language of §12.42 and §12.425 of the Texas Penal Code further demonstrates Appellee's proposed interpretation is gravely flawed.

In addition, multiple principles of statutory construction directly contradict Appellee's proposed interpretation of the statutory provisions at issue in this case.

1. Presuming that the entirety of §12.42(d) is intended to be effective and that the express mention of §12.35(a) state-jail felonies was not a useless act, it is clear §12.35(c) state-jail felonies may be sentenced pursuant to §12.42(d).

In construing a statute, courts must presume that the entire statute is intended to be effective. Tex. Gov't Code §311.021(2). Additionally, reviewing courts will not presume that the Legislature did a useless thing. *Childress v. State*, 784 S.W.2d 361, 364 (Tex. Crim. App. 1990). Moreover, courts "must presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *State v. Schunior*, 506 S.W.2d 29, 34 (Tex. Crim. App. 2016). It is a well-established rule of statutory interpretation that "the express mention or enumeration of one person, thing, consequence, or class is tantamount to an exclusion of all others." *Id*. at 38.

In construing §12.42(d) of the Texas Penal Code, we must presume the entire statute was intended to be effective and that express exclusion of *§12.35(a) felonies* from §12.42(d) was not a useless act. Section 12.42(d) overtly treats §12.35(a) state jail felonies differently than §12.35(c) state jail felonies. *See* Tex. Penal Code §12.42(d) ("if it is shown on the trial of a felony offense *other than a state jail felony punishable under Section 12.35(a)*...") (emphasis added). The express mention of §12.35(a) state-jail felonies as *ineligible* for sentencing pursuant to §12.42(d) is tantamount to the *inclusion* of a §12.35(c) state-jail felony, as a §12.35(c) state-jail felony was *not* expressly excluded.

If the Legislature had desired for §12.425 to govern the punishment range applicable to *all* state-jail felonies, it could have easily done so. The Legislature could have amended §12.42(d) as follows when it enacted §12.425 in 2011:

> (d) … if it is shown on the trial of a felony offense other than a state jail felony ~~punishable under Section 12.35(a)~~ that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years...

But the Legislature did *not* amend §12.42 of the Texas Penal Code in this manner in 2011, nor in subsequent years when it otherwise amended §12.42.[13] In a similar vein, the Legislature *could* have included a limiting clause in §12.425, indicating that §12.425 operates to the exclusion of all other enhancement sentencing provisions when the primary offense is a state-jail felony, whether a §12.35(a) or §12.35(c) state-jail felony. Again, the Legislature did not do so.

When interpreting a statute, a court reviews not only the single, discrete provision at issue but the other provisions within the whole statutory scheme as well. *See Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). Reviewing the entire statutory scheme, namely sections 12.35, 12.42(d), and 12.425, it is clear that the Legislature chose to retain the availability of habitual-offender punishment for §12.35(c) felonies.

The plain language of the statutes at issue—giving effect to each word used and presuming the Legislature did not do a useless thing—indicates that an offender charged with a §12.35(c) state jail felony that has two or more prior, sequential, non-state jail felony convictions faces 25-99 years or life in prison.

This interpretation does not lead to an absurd consequence that the Legislature could not have *possibly* intended. *Boykin*, 818 S.W.2d at 783 (emphasis in original).

[13] *See* Acts 2013, 83rd Leg., ch. 161 (SB 1093), §16.003, effective September 1, 2013; Acts 2013, 83rd Leg., ch. 663 (H.B. 1302) §§7-9, Acts 2013, 83rd Leg., ch. 1323 (S.B. 511) §11, Acts 2015, 84th Leg., ch. 770 (H.B. 2299), §2.82).

"There is nothing absurd in providing that non-state-jail felonies and aggravated state jail felonies, but not unaggravated state jail felonies, be eligible for enhancement of punishment to 'habitual offender' status, regardless of the number of prior felony convictions." *State v. Webb*, 12 S.W.3d 808, 812 (Tex. Crim. App. 2000). It is readily apparent that the Legislature wished to provide increased punishment ranges for repeat state-jail felony offenders who have previously been sentenced to terms in prison, previously been convicted of particularly grievous offenses, and offenders that use or exhibit deadly weapons during the commission of the otherwise non-aggravated state jail felony.

2. The Legislature is presumed to not implicitly overrule other statutes, and if there is conflict between statutory provisions, any conflict between the provisions should be harmonized, with effect given to all provisions if they can stand together and have concurrent efficacy.

The Legislature is presumed to know the existing law[14] and is presumed not to 'implicitly' overrule other statutes; if statutes appear to be in conflict with each other, "if it is possible to fairly reconcile them, such is the duty of the court." *See cf. Cole v. State*, 170 S.W. 1036, 1037 (Tex. 1914).[15] Additionally, if two statutes

[14] *See Moore v. State*, 868 S.W.2d 787, 790 (Tex. Crim. App. 1993).

[15] "Knowledge of an existing law relating to the same subject is likewise attributed to the Legislature in the enactment of a subsequent statute; and when the later Act is silent as to the older law, the presumption is that its continued operation was intended, unless they present a contradiction so positive that the purpose to repeal is manifest. To avoid a state of conflict an implied repeal results where the two acts are in such opposition. But the antagonism must be

are *in pari materia*, then "[a]ny conflict between their provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy." *Azeez v. State*, 248 S.W.3d 182, 192 (Tex. Crim. App. 2008) (quoting *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988)). "Rather than to harmonize, Appell[ee] would have us cultivate conflict."[16]

Appellee advocates for an interpretation in which the enactment of §12.425 *implicitly* repealed §12.42(d)'s application to §12.35(c) state-jail felonies—despite the fact the Legislature left the explicit reference to §12.35(a) state-jail felonies in §12.42(d), when it could have simply deleted it. "Laws are enacted with a view to their permanence…*[k]nowledge of an existing law relating to the same subject is [attributed] to the Legislature in the enactment of a subsequent statute; and when the later Act is silent as to the older law, the presumption is that its continued operation was intended*." *Cole*, 170 S.W. at 1037 (emphasis added). To the extent Appellee's proposed construction would have this Court hold §12.425 implicitly repealed the language in §12.42(d)—which excludes *only* §12.35(a) state-jail

absolute, -- so pronounced that both can not stand. Though they may seem to be repugnant, if it is possible to fairly reconcile them, such is the duty of the court."

[16] *See Crawford v. State*, 509 S.W.3d 359, 362 (Tex. Crim. App. 2017), *see also infra* (discussing *Crawford*).

felonies from habitual offender status—such an interpretation would be misguided and should be avoided:

> Repeals by implication are not favored, and *will not be indulged if there is any other reasonable construction*. The presumption is always against the intention to repeal where express terms are not used and the implication, in order to be operative, must be necessary. *A law is not repealed by a later enactment, if the provisions of the two laws are not irreconcilable* nor necessarily inconsistent, but both may stand and be operative without repugnance to each other. *Nor can one act be allowed to defeat another if, by a fair and reasonable construction, the two can be made to stand together*. Although two acts are seemingly contradictory or repugnant, they are, if possible by a fair and reasonable interpretation, to be given such a construction that both may have effect.

White v. State, 7 S.W.2d 1086, 1087 (Tex. Crim. App. 1928) (emphasis added). Section 12.42(d) and §12.425 can be harmonized, with §12.425 providing the punishment range for a §12.35(c) offender with "a" prior non-state-jail felony conviction, and §12.42(d) providing the punishment range for a §12.35(c) offender with *multiple* prior non-state-jail felony convictions, in sequence. Indeed, that is similar to this Court's analysis in *Crawford v. State*.

3. *This Court recently rejected a defendant's attempt to "cultivate conflict" between two statutes "[r]ather than to harmonize" them; instead,* Crawford v. State *recognized that one sentencing provision applied to defendants with "a single" prior conviction, while the other applied to defendants with "multiple prior" convictions.*

Appellee essentially argues that when it comes to state-jail felonies, Section 12.425's enhancement scheme operates to the exclusion of any other enhancement sentencing statutes, in particular §12.42(d). Appellee's analysis, however, is

contrary to the principles of statutory construction this Court applied just a few years ago in *Crawford.*

In *Crawford v. State*, this Court considered whether a defendant convicted of failure to comply with sex-offender-registration requirements was subject to sentencing pursuant to §12.42(d) of the Texas Penal Code or was limited to the sentencing scheme set out in article 62.102(c) of the Texas Code of Criminal Procedure. *Crawford v. State*, 509 S.W.3d 359, 360-61 (Tex. Crim. App. 2017).

The appellant was charged with failure to comply with sex-offender-registration requirements, a third-degree felony. *Id*. at 360; Tex. Code Crim. Proc. art. 62.102(b)(2). The indictment also alleged *two* prior sex-offender-registration offenses in enhancement paragraphs, bringing the appellant "within the ambit of Section 12.42(d) of the Penal Code and thereby raise[d] his exposure to a term of life, or not more than 99 years or less than 25 years, in the penitentiary." *Crawford*, 509 S.W.3d at 360.

The appellant asserted the State could not use his prior felony offenses for failure to comply with sex-offender-registration requirements for enhancement under section 12.42(d) of the Penal Code because "the sex-offender-registration scheme has its own specialized provision for enhancing a sex-offender-registration offense with prior sex-offender-registration infractions." *Id*. The appellant argued, "at least when it comes to enhancing sex-offender-registration offenses…[a]rticle

62.102(c) covers the field—to the exclusion of any application of Section 12.42(d)." *Id*. at 361.

The *Crawford* Court observed, however, that Article 62.102(c) "only addresses how to enhance a subsequent sex-offender-registration offense with a *single* prior sex-offender-registration felony offense." *Id*. (emphasis added). The statute "does not expressly say how a sex-offender registration defendant may be enhanced in the event that he should have incurred *multiple* prior sex-offender-registration offenses." *Id*. at 362 (emphasis in original).

Applying principles of code construction, this Court observed that if any conflict between the two statutory provisions existed, *the provisions should be harmonized, if possible*, so effect could be given to all the provisions if they could be made to stand together and have concurrent efficacy. *Id*. (discussing Tex. Gov't Code §311.026(a)). The Court noted it could not see why an offender charged with an offense such as burglary could not be habitualized under Section 12.42(d) based on two prior sex-offender-registration convictions without causing conflict with Article 62.102(c). *Crawford*, 509 S.W.3d. at 363. Indeed, it was preferable to read the statutory language in 62.102(c) for what it said and no more; "Article 62.102(c) simply does not address the multiple-prior-sex-offender-registration-offense scenario." *Id*. at 364. Because Chapter 62 of the Code of Criminal Procedure contained no provision for habitualizing a sex-offender registration offense… code

construction principles dictate that we fall back on the general enhancement provisions in Section 12.42 of the Penal Code." *Id*. "Such a reading harmonizes Article 62.102(c) and Section 12.42 of the Penal Code, and does so in such a way as to maximize the efficacy of both." *Id*.

The logic of *Crawford* is directly on point in this case; §12.42(d) and §12.425 can likewise be harmonized, and in a similar fashion. While §12.425 contains a provision that applies to §12.35(c) offenders, it only deals with the §12.35(c) offender who has "a" prior, final, non-state-jail felony conviction. What of the §12.35(c) offender who has *multiple* prior, final, non-state-jail felony convictions, *in sequence*? Section 12.42(d) addresses the §12.35(c) felony offender with "*multiple*-prior-[final-sequential-non-state-jail felony convictions] scenario." *See id*. "Rather than to harmonize, [Appellee] would have [this Court] cultivate conflict." *See id*. at 362 (emphasis added).

As this Court did in *Crawford*, where §12.425 contains no provision for habitualizing a §12.35(c) offender with multiple prior offenses, "code construction principles dictate that we fall back on the general enhancement provisions in Section 12.42 of the Penal Code." *Crawford*, 509 S.W.3d at 364. There is no limiting language in §12.425 or §12.42 indicating §12.35(c) offenses are *excluded* from the application of §12.42 of the Texas Penal Code. To the contrary, the Legislature actually left an *explicit* reference including such offenses in the application of

§12.42. Just as in *Crawford*, this Court should reject Appellee's attempt—in direct contradiction of numerous aforementioned principles of statutory construction—to cultivate conflict, and should instead read the statutes to harmonize them and to "maximize the efficacy of both." *See id*. at 364.

Such a reading harmonizes the statutory provisions, effectuates the plain, objective meaning of the literal text, and avoids an absurd result. Indeed, it is Appellee's overbroad application of §12.425 to 'cover the field' of all state-jail felony offenders—§12.35(a) and §12.35(c) alike—that would yield an absurd result.

Pursuant to Appellee's construction, a defendant who commits a non-aggravated state-jail felony and has been previously convicted of just two non-state-jail felonies would be subject to 2-20 years in prison, while a defendant who commits an *aggravated* state-jail felony, whether the defendant has been previously convicted of 1 or 10 non-state-jail felonies, would be limited to the exact same range of punishment: 2-20 years in prison.[17] Though the Legislature took obvious measures to differentiate the punishments applicable to non-aggravated and aggravated state-

[17] To further illustrate, these are the practical implications of Appellee's proposed construction:

Non-aggravated state jail felony + 2 prior non-state jail felony convictions =	20 years in prison
Aggravated state-jail felony + 1 prior non-state-jail felony conviction =	20 years in prison
Aggravated state-jail felony + 2 prior non-state-jail felony convictions, in sequence =	20 years in prison
Aggravated state-jail felony + 10 prior non-state-jail felony convictions, in sequence =	20 years in prison

jail felonies,[18] Appellee's proposed interpretation seeks to essentially nullify those efforts. Appellee's proposed interpretation is also contrary to the consistent intent of our Legislature to deal "in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *See cf. Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (discussing Texas recidivist statutes).[19]

A reading which harmonizes §12.425 and §12.42 should be employed. A §12.35(c) offender with *a single* prior, final, non-state jail felony conviction could be sentenced as provided by §12.425(c), while a §12.35(c) offender with *two (or more)* prior, non-state jail felony convictions could be subject to sentencing as provided by §12.42(d) of the Texas Penal Code. *See Crawford*, *supra*.

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[18] *See also Samaripas v. State*, 454 S.W.3d 1 (Tex. Crim. App. 2014) (In *Samaripas*, this Court addressed the use of an enhanced, non-aggravated state-jail felony to further enhance an individual as a habitual offender. Based on the language of the statute at the time, the Court found this was permissible. It is notable that Presiding Judge Keller's dissent also observed the Legislature took a "two-tiered" approach to state-jail felonies, with different treatment applicable to aggravated vs. non-aggravated state-jail felonies. *See id*. at 9-12 (Keller, P.J., dissenting)).

[19] *Rummel* also noted:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Rummel, 445 U.S. 263 at 284.

C. A §12.35(c) state-jail felony does not need to change its "offense level" before §12.42(d) of the Texas Penal Code may be applied.

Appellee also relies on this Court's opinion in *Ford*, which held that the sex-offender registration enhancements do not increase the *level* of the offense; rather, they increase the applicable punishment range to the next highest felony. *Ford v. State*, 334 S.W.3d 230, 235 (Tex. Crim. App. 2011)[20]; Brief for Appellee at 24. When it comes to Appellee's case, however, the holding in *Ford* is beside the point. 'Offense level' does not dictate whether a §12.35(c) state-jail felony can be habitualized pursuant to §12.42(d) of the Texas Penal Code.

In *Ford*, the statutory language of the sex-offender sentencing statutes and the Penal Code's sentencing statutes precluded the charged offense from being punished as a first-degree felony. The defendant in *Ford* had only *one* prior felony conviction that could be used for enhancement under Texas Penal Code §12.42. *Ford*, 334 S.W.3d at 231. The State had attempted to cobble together a punishment level enhancement from article 62.102(c) and a prior final conviction for arson into a §12.42(d) habitual offender sentence. *See id*. The *Ford* Court held, however, a prior sex-offender-registration offense changed only the punishment range and did not affect the offense level. *Ford*, 334 S.W.3d at 235. In doing so, *Ford* noted the intermediate court of appeals erred to rely on dicta in *Webb* which implied "12.35(c)

[20] Distinguishing dicta in *State v. Webb*, 12 S.W.3d 808, 811-12 (Tex. Crim. App. 2000).

increase[d] the offense level…[when] 12.35(c) increases the punishment level" alone. *Id*. at 234.

Accordingly, that defendant's sex-offender-registration offense remained a *third-degree* felony which foreclosed application of §12.42(b) of the Texas Penal Code. *See* Tex. Penal Code §12.42(b) ("…if it is shown *on the trial of a felony of the second degree* the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), *on conviction the defendant shall be punished for a felony of the first degree*.").

Section 12.42(d), however, applies more broadly to "a felony other than a state jail felony punishable under 12.35(a)…" Tex. Penal Code §12.42(d). Section 12.42(d) does not specify an offense level to which it applies. *Id*. Section 12.42(d) applies provided the current offense is *not a 12.35(a) state-jail felony* and the prior convictions meet the statutory requirements of sequencing and finality. *See id*. Accordingly, *Ford*'s holding regarding the 'offense level' has no effect on the application of §12.42(d) to a §12.35(c) state-jail felony.

To illustrate, while the defendant in *Ford* could not be punished within the range of punishment associated with a first-degree felony based on the combination of his sex-offender-registration enhancements—which raised the punishment level from that of a third-degree felony to that a of a second-degree felony—*and* his arson conviction, he *could* have been punished under the habitual offender statute

regardless of the level of his charged offense *if* he had the criminal history to substantiate the enhancements. If the defendant in *Ford* had had an *additional* final conviction for a non-state-jail felony offense—regardless of whether his sex-offender-registration offense was a third-degree or second-degree felony—he would fall within the ambit of §12.42(d) of the Texas Penal Code. *Ford* has no effect on the application of §12.42(d), provided the offender is charged with a felony "other than a state jail felony punishable under 12.35(a)…" Tex. Penal Code §12.42(d).

D. Appellee fails to distinguish **Terrell***, a case which rejected the very same claim Appellee asserts in the instant case.*

Appellee acknowledges cases that have held §12.35(c) state-jail felonies are treated differently, but attempts to distinguish them based on the fact that the opinions were issued prior to the Legislature's enactment of Texas Penal Code §12.425 in 2011. *See* Brief for Appellee at 14-15.

Noticeably absent from Appellee's briefing is any analysis or attempt to distinguish *Terrell v. State*[21], cited favorably in the Third Court's analysis.[22] The *Terrell* court engaged in a detailed and well-reasoned analysis of the interplay between sections 12.35, 12.42 and 12.425 of the Texas Penal Code.

[21] No. 01-14-00746-CR, 2016 Tex. App. LEXIS 8875 (Tex. App.—Houston [1st] Aug. 16, 2016, no pet.)(not designated for publication). Other than a passing mention, Appellee does not address *Terrell*. *See* Brief for Appellee at 27.
[22] *State v. Kahookele*, 604 S.W.3d 200, 211 (Tex. App.—Austin 2020, pet. granted).

In *Terrell*, the defendant was charged with possession of a controlled substance, less than one gram. *Id*. at *2. The State gave notice that it intended to seek an affirmative finding that during the commission of the charged offense, Terrell used a deadly weapon. *Id*.[23] Terrell's indictment included two enhancement paragraphs, "alleging that prior to the commission of the indicted offense, Terrell had been convicted of two sequential crimes." *Id*. The jury found Terrell guilty, and the court sentenced Terrell to fifty years in prison. *Id*. at *3.

On appeal, Terrell challenged his sentence, claiming that the sentence he received was greater than provided for by statute. *Id*. at *6-7. The Court of Appeals addressed his claim and noted that when a "defendant is found to have 'used or exhibited' a deadly weapon 'during the commission of the offense,'" the punishment for an ordinary state-jail felony is "enhanced to that of a third-degree felony." *Id*. at *13. "This is known as an aggravated state-jail felony." *Id*. "An aggravated state-jail felony may be enhanced further by the habitual-offender statutes." *Id*.

Terrell argued that his sentence was "controlled by Penal Code §12.425(c), which applies a maximum punishment equivalent to a second-degree felony, and that the statute does not permit any state-jail felony to be enhanced to punishment beyond that of a second-degree felony." *Id*. at *14. According to the Court, while

[23] *See* Tex. Penal Code Sec. 12.35(c)("An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense").

"§12.425(c)[24] *could* apply to Terrell's offense," it was not "the *exclusive* means of enhancing state-jail felony punishments." *Id*. at *14, 16 (emphasis added). The Court explained:

> …section 12.42(d) expressly provides that it may apply 'to a felony offense other than a state jail felony punishable under [§] 12.35(a).' Since an aggravated state-jail felony is not punishable under [§] 12.35(a), and is instead punishable under [§] 12.35(c), it is included among the felony offenses eligible for sentencing under [§] 12.42(d).

Id. Terrell met the requirements of §12.42(d), thus he could be "enhanced to habitual-offender status under [§] 12.42 by two sequential prior felony convictions." *Id*. The Court also rejected Terrell's argument, relying on principles of statutory construction, that the title of §12.42 supported his contention that §12.42 does not apply to state-jail felonies. *Id*. The Court held that while titles of statutes *may* aid in statutory construction *when the text is ambiguous*, no ambiguity existed in this case, "thus [there was] no need to resort to canons of construction." *Id*. The Court overruled Terrell's argument that he received an illegal sentence. *Id*. at *18.

[24] Section 12.425(c) "is the only provision of section §12.425 that applies to aggravated state jail felonies." *Id*. at *14.

II. Even if, for the Sake of Argument, the Statutory Language of Sections 12.35, 12.42, and 12.425 Was Considered 'Ambiguous,' a Review of Extratextual Factors Reinforces That the Legislature Intended to Punish §12.35(c) State-Jail Felony Offenders With Multiple Prior Convictions Under §12.42(d).

The statutory language of the sentencing provisions at issue in this case does not lead to absurd results, nor is the language ambiguous. Accordingly, departing from the plain language rule of statutory construction would run afoul of the Texas Constitution.[25] However, for the sake of argument, if the statutory language *was* ambiguous, extratextual factors reveal the Legislature's intent to allow a §12.35(c) state-jail offense to be sentenced pursuant to §12.42(d).

A. The Legislature has always treated §12.35(c) state-jail felonies differently than §12.35(a) state-jail felonies, consistently reserving harsher punishment for §12.35(c) state-jail felonies.

In 1993, the 73rd Legislature created the state-jail felony. At that time, the Legislature enacted §12.35 of the Texas Penal Code, article 42.12 §15 of the Code of Criminal Procedure, and amended §12.04 and §12.42(a), (e) of the Texas Penal Code.[26] *See* Acts 1993, 73rd Leg., ch. 900 (SB 1067) (effective 9/1/1994).

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[25] *See Boykin*, 818 S.W.2d 785-86 (if the plain language of a statute leads to absurd results or is ambiguous, *then and only then, out of absolute necessity*, is it constitutionally permissible for a court to consider…extratextual factors…") (emphasis added).

[26] The Houston Court of Appeals observed the significance of the legislative changes applicable to §12.42 with the creation of the state-jail felony and the implication these changes had on the statute's practical application with regard to aggravated or §12.35(c) state-jail felonies:

> …the addition of subsection (e) allowed only aggravated state jail felonies to be used for enhancement, while subsections (a), (b), and (c) had previously allowed

The new legislation provided:

- A new classification of felony offense: the state-jail felony.
- One type of state-jail felony, the §12.35(a) state-jail felony, was punishable by 180 days-2 years in state jail.
- The second type of state-jail felony, the §12.35(c) state-jail felony, was punishable by 2-10 years in prison.
- A §12.35(c) felony offender with a prior final felony conviction was treated the same as a third degree felony offender and was subject to a range of punishment associated with a second degree felony.
- A §12.35(c) felony conviction *could* be used to enhance an offender to habitual offender status.
- The habitual-offender statute appeared to allow any felony be sentenced pursuant to §12.42(d).[27]
- A conviction for a state-jail felony required the trial court to impose mandatory probation.

See Tex. Penal Code §12.04; §12.35; §12.42; Tex. Code Crim. Proc. art. 42.12 §15 (effective September 1, 1994).

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enhancement by "any felony." With the addition of the new category of state jail felony, it thus became necessary to change subsections (a), (b), and (c) from "any" felony to "a" felony to avoid a conflict with subsection (e).

The result is that "a felony" in subsections (a), (b), and (c) was crafted as a term of art to mean "any felony except a regular state jail felony." We see no reason not to use the same meaning for "a felony" in subsection (d). Therefore, we conclude the legislature meant to exclude only regular state jail felonies in all four instances in which it changed "any felony" to "a felony." This means that an aggravated state jail felony may be enhanced by two prior convictions in the proper sequence to habitual offender status under subsection (d).

Smith v. State, 960 S.W.2d 372 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

[27]*But see Mancuso*, 919 S.W.2d at 90 (Under the 73rd Legislature's version of the statute, ***§12.35(a)*** state-jail felonies could not be enhanced under §12.42(d)).

Prior to voting on Senate Bill 1067, Senator Armbrister questioned Senator Whitmire—the author of SB 1067—regarding habitual offenders who commit state-jail felonies:

> SENATOR ARMBRISTER: …could you go with us just briefly what the effect on the old habitual criminal would be, *he's got two priors and then he commits one of these which is now a state, can that still be used for enhancement for a third time loser or habitual*. How's that going to be handled?
>
> SENATOR WHITMIRE: The fourth degree or the state jail felon will remain a state jail felon as long as he or she is committing state jail felonies. *If you've committed a (3)g offense previously [i.e., a §12.35(c) state-jail felony], you're not eligible for a state jail*.
>
> SENATOR ARMBRISTER: Okay.
>
> SENATOR WHITMIRE: *Or if you commit a state jail offense with a weapon [i.e., a §12.35(c) state-jail felony] you're not eligible, those two will enhance you*. *Otherwise*, as long as you're in the loop so to speak in committing state jail felonies, *you will remain a candidate for the state jail*.

State v. Mancuso, 919 S.W.2d 86, 89 n.6 (Tex. Crim. App. 1996) (citing Tape 1, side 1).[28] The author of the earliest version of the statute clearly envisioned a two-tiered approach to state-jail felonies. As originally drafted, §12.42 was consistent with this intent, providing that a §12.35(c) felony could be used to enhance other non-state-jail felony offenses and a §12.35(c) felony could be sentenced pursuant to the habitual offender provision in §12.42(d).

[28] Although this case was later abrogated in part by statute, the legislative history for Senate Bill 1067 remains the same.

In 1995, the Legislature revisited state-jail felonies. Among the changes—while the Legislature authorized a higher punishment range for repeat offenders on trial for a §12.35(a) state-jail felony and removed mandatory community supervision for the §12.35(a) state-jail felony—§12.42(d) was amended to limit the *type* of state-jail felony eligible for habitual offender status. *See* Acts 1995, 74th Leg., ch. 318 (SB 15) (effective 9/1/1995). Specifically, §12.42(d) was amended to reflect that it only applied "on the trial of a felony offense *other than a state jail felony punishable under Section 12.35(a)*." Tex. Penal Code §12.42(d) (emphasis added).

These legislative amendments demonstrated a desire to impose harsher penalties on repeat §12.35(a) offenders and give judges greater leeway in sentencing,[29] while precluding habitual offender enhancement of a §12.35(a) state-jail felony and the use of a §12.35(a) state-jail felony conviction to enhance a non-state-jail felony offense. Notably, *none* of these amendments addressed §12.35(c) state-jail felonies. The only effect the express *exclusion* of §12.35(a) state-jail felonies from §12.42(d) had was the implied continuing *inclusion* of §12.35(c) state-jail felonies, consistent with the Legislature's original intent to treat §12.35(c) state-

[29] *See also* House Committee Report Bill Analysis C.S.S.B. 15, May 10, 1995 ("If enacted, C.S.S.B. would address some of the implementation problems with the state jail system by restoring more discretion to judges who sentence state jail felons, by eliminating mandatory supervision of sentence for state jail felons, and by increasing the period of community supervision for repeat offenders.").

jail felonies differently and allow more severe punishment for those types of offenses.[30]

In 2011, the Legislature enacted §12.425 of the Texas Penal Code. This legislation pulled former sections §12.42(a)(1) and (a)(2) dealing with §12.35(a) state-jail felony enhancements into the new §12.425 statute. The legislation also amended §12.42(a)(3). Section 12.42(a)(3) had provided the punishment range for a §12.35(c) felony with *one* prior non-state-jail felony conviction. The 2011 legislation moved that discrete provision from §12.42(a)(3) to §12.425. No changes were made to §12.42(d).

The House Committee Report on House Bill 3384 recognized:

> ...amendments have been made to the state jail statute over the years that have enhanced the punishment of state jail felonies to the more serious ranges of punishment associated with first, second, and third degree felonies *and that have classified more serious state jail offenses as aggravated offenses*.
>
> It is further noted by interested parties that if it is shown on the trial of a state jail felony offense that the defendant has previously been finally convicted of two state jail felonies, the offense may carry the punishment of a third degree felony[31] or it may carry the punishment of a second degree felony if the individual has been previously convicted of two felonies and the second felony is for an offense that occurred subsequent to the first previous conviction becoming final.[32] The parties note that *legislation is needed to clarify the meaning [of]* ***those***

[30] Indeed, if the Legislature wanted to exclude all state-jail felonies they would have simply said so, rather than specifically excluding *only* §12.35(a) state-jail felonies.

[31] This is a reference to the former §12.42(a)(1) – applicable to §12.35(***a***) state-jail felonies. (emphasis added).

[32] This is a reference to the former §12.42(a)(2) – applicable to §12.35(***a***) state-jail felonies. (emphasis added).

> *provisions* and to specify that *the felonies do not include state jail offenses* ***that are not aggravated***. *H.B. 3384 seeks to remain true to the intent of the legislature* when it created the lower-level category of state [jail] felony offenses ***and to retain the special treatment given to state jail offenses punishable as aggravated state jail felonies***.

House Comm. on Crim. Juris., Bill Analysis, H.B. 3384, 82nd Leg., R.S. (2011).

In testimony before the Committee on Criminal Jurisprudence on HB 3384, witness Cynthia Nahas indicated the problem the legislation sought to redress was the improper use of an *enhanced §12.35(a)* state-jail felony to enhance a *pending §12.35(a)* state-jail felony to the punishment range associated with a second-degree felony. Testimony on Tex. H.B. 3384 before the House Comm. on Crim. Juris., 82nd Leg., R.S. (April 12, 2011) (*see, e.g.* at around 36:35-44:09) (*available at*: https://house.texas.gov/video-audio/committee-broadcasts/82/). There was no mention or consideration of limiting the range of punishment applicable to the *§12.35(c)* state-jail felony pursuant to §12.42(d)'s habitual-offender provision.

Appellee argues that this legislative enactment is consistent with the "unmistakable intent" for *all* state-jail felonies to remain "low-level" felonies. Brief for Appellee at 25. That, however, is a flatly inaccurate characterization of how state-jail felonies have been treated since their creation in 1993, *particularly* with regard to §12.35(c) state-jail felonies.

In 1993, the Legislature wanted to address concerns with overcrowding and overpopulation in the prison system[33], but it also reserved special treatment for the aggravated state-jail felony. For example, initially a §12.35(c) state-jail felony conviction could enhance a non-state-jail felony offense. In 1995, while the Legislature excluded §12.35(a) state-jail felonies from habitual-offender status, §12.35(c) state-jail felonies remained eligible for habitual-offender status. The 1995 legislation demonstrated a desire to provide harsher punishment and more options at sentencing for even the §12.35(a) repeat state-jail felony offender, while reserving the harshest possible punishment for aggravated—or §12.35(c)—state-jail felonies. None of the legislative amendments in 1995 altered the application of the habitual-offender sentencing scheme as applied to §12.35(c) felonies.

Moreover, the Legislature is presumed to have knowledge of judicial interpretation of the statutory provisions at issue. *See Moore v. State*, 868 S.W.2d 787, 790 (Tex. Crim. App. 1993) ("…we must assume that the legislature was aware of our previous decisions interpreting [the statute at issue]..."). Multiple cases over the years had observed that a §12.35(c) offender could be sentenced as a habitual-offender whether based on the language of the 1993 statutory provision, or the express exclusion of *only* §12.35(a) state-jail felonies following the 1995

[33] *See State v. Warner*, 915 S.W.2d 873, 876 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd), *overruled by Smith v. State*, 960 S.W.2d 372, 375 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (discussing legislative history of Senate Bill 1067).

legislation.[34] The Legislature, presumably aware of this interpretation of §12.42(d) and its application to §12.35(c) state-jail felonies, left it untouched when it enacted §12.425 in 2011.

B. The titles of Sections 12.42 and 12.425 are a weak aid to statutory construction and cannot replace the detailed provisions of the text of the statutes.

Appellee asserts that the "specific, limiting title" of §12.425 demonstrates that §12.42(d) does *not* apply to state-jail felonies. *See* Brief for Appellee at 27-28. While a statutory title may aid in statutory construction in the case of some ambiguous word or phrase, "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." Tex. Gov't Code §311.024. A title or heading is "not meant to take the place of the detailed provisions of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528 (1947). "[H]eadings and

[34] *Webb*, 12 S.W.3d at 812 ("There is nothing absurd in providing that non-state-jail felonies and aggravated state jail felonies…be eligible for enhancement of punishment to 'habitual offender' status…"); *Smith*, 960 S.W.2d 372 ("We hold that an aggravated state jail felony was capable of being enhanced, by two additional prior convictions in proper sequence, to habitual offender status under the enhancement statute as it existed from September 1, 1994 to January 1, 1996."); *Bunton v. State*, 136 S.W.3d 355, 363 (Tex. App.—Austin 2004, pet. ref'd) ("…the legislature…expressly exempted only those state jail felonies punishable under 12.35(a)…By doing so, the legislature made aggravated state jail felonies…subject to the habitual criminal provisions of section 12.42(d)."); *Washington v. State*, 326 S.W.3d 302, 315 (Tex. App.—Fort Worth 2010, pet. ref'd) (same); *Lopez v. State*, 1999 Tex. App. LEXIS 6722, at *4-5 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (not designated for publication) ("Appellant's offense was an aggravated state jail felony punishable under section 12.35(c), not section 12.35(a), because he pleaded true to an enhancement paragraph for aggravated robbery. He also pleaded true to enhancement paragraphs for two earlier felony convictions. Thus, his punishment range was properly increased to the range applicable to an habitual offender under section 12.42(d).").

titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless." *Id*. "As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles." *Id*. Statutory titles "are of use only when they shed light on some ambiguous word or phrase…[b]ut they cannot undo or limit that which the text makes plain." *Id*. at 529.

The title of §12.42 is "Penalties for Repeat and Habitual Felony Offenders on Trial for First, Second, or Third Degree Felony" and the title of §12.425 is "Penalties for Repeat and Habitual Felony Offenders on Trial for State Jail Felony." The titles, however, do not shed light on any ambiguous word or phrase, nor can the titles limit the plain language of the statute that expresses different treatment for aggravated state-jail felonies. Moreover, an attempt to refer to "each specific provision" of §12.42 in the title would be "ungainly as well as useless." The title to §12.42 could not possibly reflect all the statutory provisions encompassed therein. To illustrate, while the title of §12.42 does not include language regarding repeat sex-offenders, how to handle offenders with juvenile priors, and the fact that a state-jail felony conviction cannot be used to enhance a non-state jail felony offense—the text of the statute clearly provides guidance in those arenas. Thus, the titles of statutory provisions provide little insight into the full scope of the statutory provision at issue. Moreover, it is the text of the statute that is law and governs—not its title or heading.

See Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 868 n.5 (Tex. 2009) (aides of construction "cannot override a statute's plain words"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012) ("a title or heading should never be allowed to override the plain words of a text").

C. The rule of lenity does not apply to statutes within the Texas Penal Code.

Appellee also asserts that "the rule of lenity may be considered if a statute or statutory scheme is ambiguous." Brief for Appellee at 28. The rule of lenity, however, does not apply to the Texas Penal Code. The rule of lenity is another term for "the cannon of strict construction of criminal statutes." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The Texas Penal Code, however, explicitly provides "[t]he rule that a penal statute is to be strictly construed does not apply to this code." Tex. Penal Code §1.05; *see also* Tex. Gov't Code §311.035 ("a statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous…[this rule] does not apply to a criminal offense or penalty under the Penal Code…").

Instead, the fair import of each of the terms of the sentencing provisions available for state-jail felonies provides that a §12.35(c) state-jail felony may be sentenced pursuant to §12.42(d), provided the defendant has the criminal history to support such a charge. While Appellee and the dissent in *Kahookele* may take issue

with the policy implications of this plain-language interpretation of the statute and its application to this particular case, "that is a legislative matter, not one for the judiciary." *Bunton*, 136 S.W.3d at 363.

Prayer

Wherefore, premises considered, the State respectfully prays that this Honorable Court affirm in all matters the judgment of the Court of Appeals—which reversed the Trial Court's Order—in this case. The State also prays for all other relief, in law and in equity, to which it may be entitled.

Respectfully submitted,

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I hereby certify that the instant Brief is computer-generated using Microsoft Word and said computer program has identified that there are 8,987 words or less within the portions of this Brief required to be counted by the Texas Rules of Appellate Procedure. The document was prepared in proportionally-spaced typeface using Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/ Jacqueline Hagan Doyer
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Certificate of Service

I, Jacqueline Hagan Doyer, Assistant District Attorney for the State of Texas, Appellant, hereby certify that a true and correct copy of this *State's Brief* has been sent to Appellee EDMUND KAHOOKELE's attorney in this matter:

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In addition to the State Prosecuting Attorney's Office at information@spa.texas.gov by electronic service to the foregoing email addresses through efile.txcourts.gov on this, the 26th day of February, 2021.

/s/ Jacqueline Hagan Doyer
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